Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 78-76

JOHN Q. ELLIOTT, M.D. ..... *Petitioner*

v.

ARKANNSAS STATE MEDICAL BOARD ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

Petitioner[1] prays that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas in the above styled case.

OPINIONS BELOW

The March 13, 1978 opinion of the Supreme Court of Arkansas is reported at 563 S.W.2d 427 and at Appendix I of this petition. The opinion of the Circuit Court, civil division, Chickasawba District of Mississippi County, Arkansas is not reported but is set forth as Appendix II. The decision and order of the Arkansas State Medical Board in the matter of John Q. Elliott, M.D., case No. C-76-200 is not reported but is Appendix III.

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[1] The petitioner is John Q. Elliott, M.D., resident of Blytheville, Arkansas.

JURISDICTION

The opinion of the Supreme Court of Arkansas was entered on March 13, 1978. The Supreme Court of Arkansas denied a timely filed petition for rehearing, Appendix IV, which was denied April 17, 1978, Appendix V. On May 1, 1978, the Supreme Court of Arkansas entered its order staying mandate pending appeal, Appendix VI.[1] At this time no petitions for extension for filing this petition have been entered.

QUESTIONS PRESENTED

1. Whether a doctor of medicine at an administrative hearing involving the question of suspension of said physician's license is denied due process of law if not informed of the nature and cause of the accusations; if not confronted with the witnesses against him; if not given the assistance of counsel for his defense or advised of his right to counsel.

2. Whether a stated determination by a voting member of the administrative hearing board, *prior to* the close of evidence states his opinion of guilt and recommendation of suspension is a violation of the equal protection of the law and due process of law provisions of the Constitution of the United States.

3. Whether a notice of a hearing specifically charging that prescriptions for schedule two drugs excessively and excessive number of prescriptions for schedule two drugs and a further allegation of "guilty of grossly negligent malpractice" in prescribing and dispensing said drugs without any particularization of misconduct or allegation of

(1) Petition for Stay of mandate pending appeal, Appendix VII.

misconduct with particular certainty is violative of the due process of law and equal protection clause?

4. Whether or not unfounded hearsay and testimony replete with conclusions, conjecture, speculation and guess work not objected to at the administrative hearing (without counsel) but timely raised on appeal to the Supreme Court of Arkansas are a denial of due process of law and equal protection of the law as to this petitioner?

5. Whether an administrative hearing held or conducted in such a way as to curtail or limit explanation or denial of an opportunity to be heard is a denial of the due process and the equal protection of the laws as to this petitioner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to be informed of the nature and cause of the accusation, confrontation of witnesses and assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

and the Due Process and Equal Protection of the Laws' Clauses of the Fourteenth Amendment to the Constitution of the United States:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and the due process of law guaranteed under the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

STATEMENT

On October 27, 1976, the State Medical Board served notice on John Q. Elliott, M.D. to appear and show cause why his license to practice medicine in the State of Arkansas should not be revoked. Said order appears as Appendix VIII. Neither the order nor the record indicates that there were any exhibits attached to the appear and show cause order. Following said hearing and an adverse determination by the State Medical Board, a timely appeal was taken to the Circuit Court of the Chickasawba District of Mississippi County, Arkansas, the Honorable A. S. Harrison presiding.

Upon the matter being submitted to the Circuit Court, the State Medical Board's order was reversed, the said court making a particular finding that the evidence as read the court finds that there was a violation of the doctor's constitutional rights and due process. That an excessive authority was exercised by the board in suspending the doctor for four months based upon the evidence which was lodged in the Circuit Court.[2]

The Circuit Court further held[3] in reviewing the testimony of the two witnesses, said testimony was replete with conclusion, conjecture, speculation and guess work, reversing the State Medical Board and staying further action of the Medical Board pending an appeal to the Arkansas Supreme Court, which appeal was perfected. The Circuit Court was reversed and the order of the State Medical Board was reinstated. The Supreme Court opinion reversed and remanded the matter, Appendix I.

The petitioner has exhausted all state remedies, a

[2] Page 16 of the record lines 1 thru 5.

[3] Page 12 of the record lines 12 thru 14.

petition of rehearing was properly and timely filed, denied April 17, 1978, less than ninety (90) days prior to the filing of this petition.

REASONS FOR GRANTING THE WRIT

This case involves five constitutional issues, all of which are Amendments Five, Six and Fourteen. First of which is under the Fifth Amendment in that the doctor at an administrative hearing involving the question of suspension of his license (a penal provision) through the guise of a civil proceeding was denied due process of law under the Fifth Amendment having not been informed of the nature and cause of the accusation against him with particular certainty nor given an opportunity to be confronted with witnesses, nor been advised of his right to the assistance of counsel for his defense and the other miranda rulings under the Sixth Amendment when licensure or suspension of licensure (a very penal provision) of the various regulatory agencies is to be invoked to the detriment of the doctor, this petitioner.

It is the doctor's contention and belief that the proceeding was of a penal or criminal nature much more so than of a civil nature. That the failure of the Arkansas State Medical Board to advise this petitioner of his constitutional right, to advice of counsel or that what he says could and would be used against him, that he had a right to cross examine witnesses, that he had a right to confront the witnesses to appear against him, that he had a right to call witnesses in his own behalf, and that he was entitled to an allegation of particular certainty as to what charges were being raised at said hearing. The failure to be so informed by the administrative hearing officers resulted in a denial

of the doctor's constitutional right under the Fifth and Sixth Amendments to the Constitution.

The entire proceeding appears to be criminal or penal in scope as opposed to civil, noting "the present charge" (R. 68). The real question then being is, "whether or not the penal characteristics of the loss of licensure or suspension is such that same would be classified as a quasi criminal case, *Ferguson v. Gathright,* 415 U.S. 933, 39 L. Ed. 2nd 491, 94 S.Ct. 1447, noting the denial and lack of information regarding the right to counsel. The record shows clearly that the State Medical Board was represented by counsel and that no comment or other suggestion was ever made to Dr. Elliott of his right to counsel or whether or not he desired counsel."[4]

Further it is the petitioner's claim that had the doctor been advised of his right to counsel or had he appeared with counsel the vagueness and ambiguity contained within the order to show cause, the allegations of particularization of conduct would have been made sufficiently certain to such extent that the doctor would have been able to put up a well and true defense or offer a ready explanation or as a bare minimum would have had the opportunity to do so.

Further, the case involves the question of whether or not a stated determination by a voting member of the administrative hearing board, prior to the close of evidence, of said member's opinion of guilt and recommendation of suspension and an absolutely unequivocal statement of revocation of a DEA (Drug Enforcement Agency Number) with no other consideration to the other voting board members, the hearing continuing following said statement

[4] Note the opening remarks of the State Medical Board Counsel Record — page 68 and the absence of warnings or advise.

is a violation or a denial of the equal protection of the laws under Amendment Fourteen, subsection 1 of the Constitution and of the due process clause of the Fourteenth Amendment and of the guarantee of *constitutional fairness* contained within said Amendments. In reference thereto, this point was timely raised in both the Circuit Court and on appeal to the Arkansas Supreme Court. The Secretary and voting member of the Arkansas State Medical Board, prior to the close of evidence (R. 79) stated "I think this board is going to have to suspend your license this is my personal feelings. I don't think you are going to get out from under these people unless we do," Dr. Joseph Verser[5] speaking. Further the same Dr. Joseph Verser continuing to speak (R. 80), regarding the question of taking advantage of a doctor, "I know there are not anymore because I know one they are going to take your DEA and I would personally vote to suspend your license. I don't know what the board is going to do but you are not going to get out of here with a DEA. I know the board well enough to know you are going to lose your DEA. I don't know how they are going to vote on whether to suspend your license but I would say to suspend your license and wake up the town of Blytheville to the fact that this board has taken action and will wake up some more of those people who have been imposing on you." Following said statement the hearing continued (R. 81 and R. 82). It is the petitioner's contention that the basis and very basic concepts of Amendment Fourteen, clause 1, were clearly violated by the board member, same being a voting member, making such a flagrant open statement prior to this petitioner being given an opportunity to call in any witnesses; prior to inquiring

[5] Dr. Joseph Verser is the Secretary of the State Medical Board and Chairs the proceedings.

of this petitioner of whether or not he had anything to say in his own behalf; nor was this petitioner given any opportunity to explain any allegations whatever to the State Medical Board.

This Court has ruled in *Wall v. American Optometric Ass'n*, in 95 S.Ct. 166, 419 U.S. 888, 42 L. Ed. 2nd 134 that under the Fourteenth Amendment a fair and impartial tribunal requires at least that trier of fact be disinterested and that he also be free from any form of bias or predisposition regarding outcome of the case and procedure must not only be fair but every appearance of complete fairness must also be present. This Court again in *Bowman Transportation, Inc. v. Arkansas Best Freight System,* 95 S.Ct. 438, 419 U.S. 281, 42 L. Ed. 2nd 447 held that Amendment Fourteen, subsection 1, forbids agency to use in evidence in a way that forecloses opportunity to offer contrary presentation. This Petitioner maintains that due process of law requires that an administrative hearing be fundamentally fair and just. This Court addressed the question of personal animosity in *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 96 S.Ct. 2308, 426 U.S. 482, 49 L. Ed. 2nd 1. It is petitioner's contention that under the Fourteenth Amendment that the statement made by Dr. Joseph Verser was a predetermination of guilt, a predisposition of the state of mind of Dr. Verser and a preconceived intention on the part of said Dr. Verser to suspend or revoke this petitioner's license irrespective of the fairness of the hearing, absolutely and unequivocally to take his DEA number for a period of four months. That this very comment, prior to the conclusion of the evidence, was made by motion by a member of the State Medical Board which was unanimously approved, without *ever* asking this

petitioner if he had anything to say, and witness to call, or any explanation of any kind.

It is the petitioner's contention and belief that this statement was prejudicial to the rights of this petitioner. That he was denied a fair and impartial determination before an administrative board under Amendment Fourteen and this denial worked to his continued detriment and denial of his right to a fair and impartial determination as guaranteed to all under our constitution and its amendments.

The next point is whether a hearing notice which simply alleges that schedule two drugs were given excessively, absent any allegations of particular certainty as to what drug was given, when and what numbers were involved and how many numbers of said drugs are needed to make said drug an excessive amount with no particularization of conduct to such extent that this doctor did not have any prior warning as to the nature and type of charge that was being lodged against him.

These things taken together are a violation of the due process of this petitioner. That he was not given an opportunity to know the exact nature of the charges lodged against him. There was no particularization or bill of particulars as to the alleged misconduct. There was no determination by anyone as to what constitutes excessive number of prescriptions. The only record contained in the transcript of the proceedings is that more prescriptions were given than could be counted on "one hand", (R. 74). While the petitioner recognizes that said language may have been figuratively given, nonetheless, it would denote a very low number. That the provisions as to what is excessive and what is grossly negligent

malpractice is so vague and uncertain that no physician acting under said guidelines can determine what constitutes negligent malpractice or what constitutes excessive writing of prescriptions. As a result thereof, this petitioner and all physicians similarly situated are at the personal whim of the various regulatory boards to determine after the fact what is excessive, excessive to be then defined by the various state boards of medical licensure. This, in and of itself thwarts the backbone of Amendment Fourteen, section 1 and due process.

The next point relied on by petitioner for granting this writ is that as a result of the lack of counsel, petitioner had no opportunity to be heard, rampart hearsay, unfounded conclusions, conjecture and speculations, together with guess work, went into the record. See testimony of Woodrow T. Little (R. 69) "The prescriptions I picked up in the area that have been verified, (not authenticated) as bearing Dr. Elliott's signature." The petitioner maintains that upon a proper objection said conclusionary statement would have been barred as hearsay and would have required some degree of proof. Further the said Woodrow T. Little testified (R. 69) "I noticed that some of these prescriptions for the amphetamine type drug and were two for the same person on the same day." (Conclusion and Speculation) But the record (R. 79) clearly shows that the double prescription had been reported previously by petitioner to law enforcement and said individual was held on a fugitive warrant. As to the other allegations, no determination was made of the medical necessity for the giving of said prescriptions. The said Woodrow Little further testified, "that Dr. Elliott's prescribing did contribute to the illegal drug traffic in that area." (R. 70) Petitioner states that same is nothing more than a conclusion on the part of

Mr. Little and is supported by no other evidence, matter, facts or things in the transcript or any of the records sent up. Further at the same page (R. 70) the record goes into the question of a recap and a recap or summary of the investigation of Mr. Little, which was submitted before the board which summary was not cross examined, was not read, was not identified, nor could the doctor have been reasonably placed on notice as to what evidence, if any, was going into the record. There were no allegations or statements contained in the testimony of Mr. Little indicating any misconduct. The attorney for the State Medical Board makes reference to some agreement on Mr. Little showing seven prescriptions to "the same individual" with no allegation nor supported measure that there was anything wrong or misconduct in giving said prescriptions nor was the patient's testimony given nor available as to whether the patient had a medical necessity for said prescriptions or not, but which was determined a medical necessity (R. 71-72).

Further, R. 71, Mr. Warren, attorney for State Medical Board, made a conclusionary statement to the Board, "We put it in here because he switched to some other drug." Dr. Elliott, from that point continuing (R. 71) clearly showed a medical necessity for the continuation and giving of said drug, said patient having had chemotherapy and various other hospitalization with exorbitant weight losses having been treated and was determined as a medical necessity. A picture was introduced and shown by Dr. Elliott, which picture is not in the records and files. Given the one opportunity to explain any prescriptions the doctor testified that his prescription blanks had been stolen and that this report was made to proper authorities. (R. 72).

Further, Mr. Little testified that he had an isolated individual that had been turned down at five different drug stores and who people had indicated or told him they wouldn't touch with a ten foot pole and why. (R. 73). The testimony therein is absolute hearsay as to what someone other than a party to this hearing had told an investigator in derogation of the rights of Dr. Elliott, this petitioner.

The next witness was Sam Probasco who stated that Pharmacist had told him (R. 74) proceeded to continue as to what the people had told him.[6] Further the said Mr. Probasco stated that Dr. Elliott was the only doctor in Blytheville writing more prescriptions of Quaalude 300 than could be counted on one hand. Further Mr. Probasco stated that all his sources were a "seedy looking group as a whole," (R. 74). Further Mr. Probasco continued at R. 75 stating that he had proof of various other matters but said proof was never submitted nor offered to the Arkansas State Medical Board. Questions were asked leading and calling for conclusions (R. 75) regarding whether or not Dr. Elliott was a patsy. In the transcript at R. 75 some appearance seems to be that Dr. Elliott is speaking and that apparently it is the testimony of someone other than Dr. Elliott.

Dr. Verser made a leading comment totally out of line at R. 76, "they tell me this is a wonderful drug, that they can take one of them and shack up a week" which drew a response from this petitioner in what appeared to be a joking or informal moment in said hearing, which a great

[6] Note: Throughout the entire record, only two witnesses were called, who time and again stated hearsay matters; not once in the entire record was a witness called who made the statement or to whom the statement was attributed; nowhere in the record is a name of the source used except by vague reference to a class or group.

deal of weight was placed on by the Supreme Court of the State of Arkansas. The record goes on and on with similar testimony, none of which is supported by the persons who make the statements and none of which is supported by any evidence, no exhibits, no statements, evidence or other indications that same was for other than a medical need, but were totally replete with conclusion, conjecture, speculation and guess work by the "Investigators". No person who had any information as to the legality or illegality of the prescriptions of the medicines prescribed by this petitioner was ever called before the board. Nowhere in the record is there any statement that any of the medicines were given for other than a medical purpose. Nowhere in the record is there a statement as to any patient that the prescription was excessive.

It is common knowledge in Arkansas that Blytheville, Arkansas, is a good sized city maintaining an air base in said city, together with being very close to Osceola, Arkansas, a very populous center. As a result, given population, practice of a given physician, prescription habits and working hours, not one page of evidence is submitted anywhere within the record not based on hearsay or foundered on conclusion of speculation by the investigators. No tangible evidence, no circumstantial evidence other than hearsay is mentioned anywhere within the record which denied this petitioner any redress whatever nor upon the conclusion of the evidence was Dr. Elliott offered an opportunity to add, explain, or take away from any of the hearsay reference, etc. On one or two occasions, the doctor in the course of the proceedings satisfactorily explained any particularization which may have been brought up for the first time at

said hearing. It is the petitioner's contention that rampant hearsay, conjecture, speculation and guess work were totally unfounded without any proof either direct or indirect and thereby denies this petitioner of the due process of laws clause of the Fourteenth Amendment of the Constitution, equal protection of the laws of the Fourteenth Amendment, due process of the Fifth Amendment and due process of the Sixth Amendment. That had the Fifth and Sixth Amendments rights been granted (advice of counsel) none of the testimony submitted in the record would have been allowed even under the most lax and informal administrative hearings. Petitioner recognizes that it is difficult to believe that absolutely no evidence, save hearsay, speculation, innuendo and guess work appears within the entire record and therefore has designated the entire record to be filed herewith.

The next point is whether an administrative hearing held or conducted in such a way as to curtail or limit explanation or denial of an opportunity to be heard is violative of the due process clause and the equal protection of the laws clause which matter has been well discussed above and to avoid repetition states this point for review.

Petitioner respectfully represents to the Court that due process and fundamental fairness are one and the same thing. An opportunity to be heard by a fair and impartial hearing officer or board. This opportunity was denied to this doctor. The denial of the constitutional matters raised herein were more beautifully set forth in the formal judgment of the Circuit Court of Chickasawba District, Mississippi County, Arkansas, than can be herein included.

Noting particularly the Court held that the denial of counsel, the basic concepts of American Jurisprudence and of due process have been denied. The Circuit Court ruled correctly (R. 15) that the State Medical Board was attacking a man's professional conduct and subjecting an individual to extreme public ridicule and abuse, doing great injury, harm and damage to his reputation which could result in action of the public generally, that even through cleared, might be damaging to the remainder of the person's days.

Further the Circuit Court found in reversing the board that there was a violation of the doctor's constitutional rights and due process. (R. 16) That an excess of authority by the board was exercised in suspending the doctor for four months based upon the evidence which had been lodged. (R. 16) That the allegations were not supported by substantial evidence. (R. 16) It is the petitioner's contention and belief that the Circuit Court for the Chickasawba District, Mississippi County, Arkansas, was correct when the court stated further in examining and reviewing the *testimony of the two witnesses* that did appear (R. 12, lines 13-21) their testimony is replete with conclusions, conjecture, speculation and guess work and giving it the greatest benefit that is entitled to in a hearing before the board in such an administrative hearing, this Court could not say that to do justice in this case, either on behalf of the Arkansas State Medical Board or the doctor, that the greatest portion of the evidence could really be given much, if any, consideration because of those facts.

Petitioner respectfully represents that said statement

is a fair statement and that the Arkansas Supreme Court committed error in reversing the learned judge and that this petitioner's due process rights were thereby denied under the Fifth and Sixth Amendments and the equal protection of the laws was denied to this petitioner under the Fourteenth Amendment and the due process clause of the Fourteenth Amendment.

CONCLUSION

The petitioner contends that when taken together the denial of the rights, the denial of counsel, the lack of counsel, the leading and suggestive informal attitude of the administrative hearing, the total void of intangible evidence, the conjecture, speculation, hearsay and conclusion and the predisposed attitude of one member of the board is such that this petitioner did not receive a fair and impartial hearing before the Arkansas State Medical Board and respectfully submits that his constitutionally protected rights of equal protection of the laws, due process of law, miranda warning and due process of the Fifth and Sixth Amendments have been denied and respectfully prays that this writ be granted not only for himself as petitioner but to restore to every person substantial justice, fair treatment, fair consideration, fair play and equal protection of the law before governmental administrative agencies. That this Court should grant this writ and serve notice that certain fundamental fairness, justices and constitutional safeguards are not only required in judicial determinations but also

before all boards, agencies and review proceedings of every kind, character and description and that said rights shall be held inviolatile and that all safeguards of constitutional due process can be and will be preserved for all Americans by issuance of certiorari to review the March 13, 1978 decision of the Supreme Court of Arkansas in this case.

Respectfully submitted,

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Appendix

APPENDIX "1"

DIVISION 2

SUPREME COURT OF ARKANSAS

No. 77-258

Opinion Delivered March 13, 1978

ARKANSAS STATE MEDICAL BOARD ..... *Appellant*

v.

JOHN Q. ELLIOTT, M.D. ..... *Appellee*

APPEAL FROM MISSISSIPPI CIRCUIT COURT
CHICKASAWBA DISTRICT

A. S. HARRISON, *Judge*

Reversed and Remanded

CONLEY BYRD, *Associate Justice*

The Arkansas State Medical Board suspended the license of Dr. John Q. Elliott on the basis that the doctor had written prescriptions of Quaalude 300 excessively and had written an excessive number of prescriptions of Quaalude 300 for some persons. On appeal the circuit court reversed the decision of the Board because the administrative finding of the Board was in violation of Dr. Elliott's constitutional rights, in excess of the Board's statutory authority and was not supported by substantial evidence of record.

The record shows that Dr. Elliott was notified by the

Board pursuant to the Administrative Procedure Act, Ark. Stat. Ann. §5-708 (Repl. 1976), to appear and show cause why his medical license should not be revoked. The notice specifically charged that Dr. Elliott had written prescriptions for Schedule II drugs excessively and had written an excessive number of prescriptions for Schedule II drugs for some persons.

Dr. Elliott personally appeared at the hearing and participated therein without making objection to the charges or requesting that they be made more definite and certain.

The authority of the Board to revoke or suspend a license is given by Ark. Stat. Ann. §72-613 (Supp. 1977), which authorizes the Board to act when a license holder has been guilty of "unprofessional conduct." The term "unprofessional conduct" is defined as "grossly negligent or ignorant malpractice." "Malpractice" is defined by a regulation of the Board to include any professional misconduct, unreasonable lack of skill or fidelity in professional duties, evil practice, or illegal or immoral conduct in the practice of medicine or surgery. The reguation says that "Malpractice" should include but not limited to "(4) the prescribing of excessive amounts of controlled substances to a patient including the writing of an excessive number of prescriptions for an addicting or potentially harmful drug to the patient."

The criteria for Schedule II drugs, Ark. Stat. Ann. §82-2606 (Repl. 1976), is as follows:

> "The Coordinator shall place a substance in Schedule II if he finds that:

> (1) the substance has high potential for abuse;
>
> (2) the substance has current accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and
>
> (3) the abuse of the substance may lead to severe psychic or physical dependence."

At the hearing which was held on December 9, 1976, it was shown that Dr. Elliott had been before the Board on November 7, 1974, at which time he had agreed not to write prescriptions for amphetamines. Lieutenant Robert Womack of the Osceola Police Department had filed a complaint against Dr. Elliott with the Arkansas Department of Health.

Samuel R. Probasco, with the Drug Abuse Division of the Arkansas State Department of Health, had investigated Dr. Elliott. His investigation revealed that Dr. Elliott was the only doctor in Blytheville who was writing more prescriptions for Quaalude 300 than could be counted on one hand. He found that the drug stores in West Memphis had turned down Dr. Elliott's prescriptions "always for one reason — youngsters, no physical need." All of the pharmacists in both Osceola and Blytheville had asked for help because of pure proliferation of the Quaalude 300 drugs. Between 7-21-76 and 11-13-76, one drug store in Blytheville filled 92 prescriptions written by Dr. Elliott, all for Quaalude 300 (30 units) except three. Mr. Probasco mentioned the case of a black male who was arrested in Osceola who had in his possession two prescriptions for Quaalude 300, — one under the name of Michael Johnson and the other one under the name Will Jones — both prescriptions having the same address. Mr. Probasco described the Quaalude 300 pills as having a street value from $3.00 to $4.00 per pill.

In response to a statement from witness Probasco that Dr. Elliott had become a patsy to the people who traffic in drugs Dr. Elliott stated, "Not anymore. Since two weeks ago, three days ago."

Dr. Elliott testified that some of his prescriptions were for kids he had known. That the people who have used Quaalude 300 told him that mixed with alcohol the drug heightens their sexual performance. He also admitted that he had given the two prescriptions to the black man. When he questioned the man the second time, the man told him he was the brother of the one that had been there before. However, in response to questions from members of the Board, Dr. Elliott stated that when the black male came in "he wanted something for sleep, didn't want anything wrong, he said."

We find ample evidence, evidence in fact corroborated by Dr. Elliott, to substantiate the Board's findings. Dr. Elliott had been prescribing Quaalude 300 for both young and old people and to persons who did not have anything wrong with them. By the doctor's own admissions, the Board had ample evidence from which to conclude that he had been a patsy for persons who traffic in illegal drugs. Furthermore, the proof shows that all of his prescriptions were for 30 units of Quaalude 300 and that he had given two prescriptions to one black male under two different names. It follows that the circuit court was in error when it held to the contrary.

Appellee contends that the circuit court should be affirmed because there is no law prescribing the number of drugs that can be prescribed for any particular patient and no law prescribing what constitutes the excessive

writing of prescriptions for any one patient. We find no merit to this contention. Subsection (e) of Ark. Stat. Ann. §72-613 (Supp. 1977), defines unprofessional conduct to mean "violation of the laws of the United States or the State of Arkansas regulating the possession, distribution or use of narcotic or controlled drugs classed in Schedules 1 through 5 of the Arkansas Controlled Substances Act. . . ." Also subsection (g) of the statute, *supra*, defines "unprofessional conduct" to include "grossly negligent or ignorant malpractice." The giving of two prescriptions to the same man under two different names who admittedly had nothing wrong with him would certainly fall within the category of "negligent or ignorant malpractice." Furthermore, can one admittedly be a patsy to persons dealing in the drug traffic and not be guilty of "unprofessional conduct" within the meaning of Ark. Stat. Ann. §75-613 *supra*? We think not.

Appellee contends that the notice given him denied him his constitutional rights because it did not tell him that he had the right to have counsel and the right to present and cross-examine witnesses. We find no merit to this contention. In the first place the notice complied with the Administrative Procedure Act, Ark. Stat. Ann. §5-708 (Repl. 1976), which superseded Ark. Stat. Ann. §72-614 (Repl. 1957). In the next place appellee has cited no authority that places upon an administrative board the same concern for an individual that is required in a criminal prosecution. We note that the Administrative Procedure Act gives to the respondent in an administrative proceeding the right to appear by counsel and to present and cross-examine witnesses, but we know of no authority that places upon the administrative board the duty to warn respondents of

such rights. In fact the authorities appear to be contrary to appellee's position, see Annotation 1 L. Ed. 2d 1865.

Appellee also suggests that the hearing officer or one of the participants in the hearing was biased because he made a pronouncement prior to the conclusion of the hearing that appellee's license should be suspended. Since this pronouncement of the Board member was made after Dr. Elliott had admitted to being a patsy to people dealing in the drug traffic; had admitted to prescribing the drug to young people to heighten their sexual performance; and had admitted to giving two prescriptions to the same man under two different names, we cannot say that the Board member's comment disqualified him under Ark. Stat. Ann. §5-709 (Repl. 1976).

For the reasons herein stated the order of the circuit court is reversed with directions to reinstate the order of the Board.

Reversed and remanded.

We agree: Harris, C.J., Fogleman and Holt, JJ.

APPENDIX "II"

IN THE

CIRCUIT COURT OF MISSISSIPPI COUNTY, ARKANSAS

DR. JOHN Q. ELLIOTT ..... *Petitioner*

VS. No. C-76-200

ARKANSAS STATE MEDICAL BOARD ..... *Respondent*

OSCEOLA, ARKANSAS, MONDAY, JUNE 13, 1977
9:30 O'Clock A.M.

(REPORTER'S NOTE: Other matters heard).

THE COURT: This is Case Number, Civil Case, Number C-76-200, on appeal, Circuit Court Civil Division, Chickasawba District of Mississippi County, Arkansas. The style of the case is Dr. John Q. Elliott, Petitioner, versus The Arkansas State Medical Board, Respondent.

All right, gentlemen.

* * * *

THE COURT: All right. Anything else?

MR. PARTLOW: No, Your Honor.

MR. CEARLEY: No, sir.

THE COURT: I assume the record reflects that Mr. Robert M. Cearley, Jr. appears here today on behalf and representing the Arkansas State Medical Board, and Mr. Graham Partlow, Jr., lawyer from Blytheville, Arkansas appears in person and with his client, Dr. John Q.

Elliott of Blytheville, Arkansas. The designated Number of the case and the transcript is C-76-200.

All right. Gentlemen, the court has made a very careful study of the transcript and all of the exhibits attached thereto, together with a careful review of the Administrative Procedure Act.

On page 10 in the transcript there is an order, a designating order to appear and to show cause, before the Arkansas State Medical Board, which was on October 26, 1976, signed and mailed to Dr. Elliott at his address, 209 West Ash Street, Blytheville, Arkansas. And on the next page, page 11, it shows a receipt of that notice on October 27, 1976, the same having been sent by Warren and Bullion, Tower Building, Little Rock, Arkansas, to Dr. John Q. Elliott, M.D., 209 West Ash Street, Blytheville, Arkansas, and signed by Dr. Elliott on October the 28th, 1976.

The court is not familiar with what training or knowledge, if any, Dr. Elliott might have with regard to law, or to the Constitution, or to the Statutory provisions, as they pertain to this particular matter, or to what rights he would be privileged to exercise in responding to the order as mailed to him.

The order itself refers to Arkansas Statute 72-613, Subsections E and G, and goes further to explain that he is alleged to have written prescriptions for Schedule 2 drugs excessively, and that he has written an excessive number of Schedule 2 drugs for some persons, and as reflected in the attached investigative report.

There is nothing in the record to indicate whether this report was attached and whether or not the doctor did receive such an investigative report.

In the third paragraph it is alleged that the doctor had been guilty of grossly negligent malpractice in prescribing and dispensing of said drugs, and the fourth paragraph orders him to appear on December 9th, 1976 at 2:00 p.m., Room 401, Little Rock Civic Center, Little Rock, Arkansas to show cause why his license to practice medicine in the State of Arkansas should not be revoked. A further sentence says, "Upon failure to appear the Board would order an immediate suspension of his license.

The record reflects that the doctor did appear in response to this order, and it does not reflect that he appeared with any counsel, or with any knowledge of the procedure to be followed in the handling of the hearing: The names, addresses, capacities of any witnesses that were to be presented against him or for him; that he had any knowledge concerning his rights to have the allegations as related in the general notice specified in particulars, stating on what dates, occasions, what pharmacist, to whom the prescription was written, for what purpose, whether in truth and in fact the doctor did write the prescriptions, or that there was anything illegal or prohibitive by law in the writing of these prescriptions.

The record does not reflect that the doctor was advised prior to the hearing that he could, if he so desired, call any witnesses in his behalf that he might wish to call, that he has a right to cross-examine any witnesses produced by the Arkansas State Medical Board, that anything that he said, or did, or any admissions that he might make could and would be used against him in the Board making its decision as a result of the hearing which they proposed to have on that occasion.

There is nothing in the record indicating that he was

advised that if the result was adverse that he had any particular right to any further consideration, or relief by the court by appeal or otherwise.

In examining and reviewing the testimony of the two witnesses that did appear, their testimony is replete with conclusions, conjecture, speculation and guess work, and giving it the greatest benefit that it is entitled to in a hearing before the Board in such an administrative hearing, this court could not say that to do justice in this case, either on behalf of the Arkansas State Medical Board, or the doctor, that the greatest portion of this evidence could really be given much, if any, consideration because of those facts.

It is true that the record shows a number of prescriptions alleged to have been written by the doctor on different occasions, and at one point the doctor made some remark that beyond that point there wouldn't be any problems in this area, but there is nothing in the record to indicate wherein the doctor, if he wrote the prescription, was wrong in writing the prescription. In fact, at one point in the record it reflects that where the doctor was given an opportunity to explain one of the prescriptions that he relates to a cancer patient which he had, and the Board readily acknowledged that this was perfectly proper that he should have given to this particular patient some drug that would award relief, and that there was nothing in that regard that denoted any wrong whatsoever.

The court also notes at one point in the record that apparently before the hearing had concluded, judgment on behalf of one of the members had already been rendered in the case; not stating that his judgment was binding on the remainder of the Board, but that this was the action that

he was going to take, and then the hearing continued and at the conclusion of which, this was the action that he did take.

Now, gentlemen, in all fairness and justice to anyone in this case or any other case, I don't know how many years that the doctor has practiced, and the record doesn't reflect how many years; it does reflect his age, and as counsel stated, is sixty-eight, or was at the time of the hearing, so, the court is not in a position to say how long the doctor has practiced in the community, but regardless of whether it is Dr. Elliott, or any other doctor, or for that matter, a lawyer, or a dentist, or any other professional man, this is a very serious proceeding to undertake. Certainly, the court agrees that all professions ought to be policed. It is grossly unfair to the public, it is grossly unfair to the profession, to have anybody who is not competent and capable, who is intent on doing what is right, fair, and just under the circumstances as they see it at the time the matter is presented to them, and giving every effort, and the results of the benefit of all of the training that they had to the interests of those that they serve, which are the public.

But, it impresses this court that even if it reaches a point where some action is necessary, and, certainly there are cases where action is necessary, every person that might be brought before a board under the Administrative Procedure Act certainly ought to be entitled to a full, and a complete, and a particularized statement of exactly what that person is charged with. I don't know how they could meet at a hearing, what the allegations might be, unless this were true, and I realize that the rules of evidence are different from what they are in the Criminal Divisions of the court, and probably are not as substantial as they are in the Civil Division of the court, but regardless of that,

just in being absolutely fair with a person these things ought to be spelled out in some particularity so that they will know exactly what it is that you seek to show in regard to whatever alleged misconduct might have been alleged to have been engaged in.

Now, this is a pretty strong statement to say that an individual who apparently up to this point, there is no record to the contrary, has practiced medicine in an honorable way, on this particular date and occasion when the order was served accusing him and alleging that he was grossly negligent, or guilty of ignorance and malpractice, without specifying in detail the particulars relied upon to support such a charge.

Here you are attacking a man's professional conduct. You are subjecting an individual to extreme public ridicule, and abuse. You are doing great injury, harm, and damage to his reputation. It could result in action on behalf of the public generally that even though cleared, might be damaging to the remainder of the person's days.

So, as the court sees it, the motion is serious undertaking. Now, under the evidence as I read the evidence in the transcript here, the court finds that there was a violation of the doctor's constitutional rights and due process, and that an excessive authority was exercised by the Board in suspending the doctor for four months based upon the evidence which has been lodged in this court; that the allegations are not supported by substantial evidence, and for these reasons, and the reasons stated in the statement the court has made to you gentlemen, the Arkansas State Medical Board's findings will be reversed, and I assume you want your exceptions noted.

MR. CEARLEY: Yes, sir.

THE COURT: And they will be of record, and exceptions noted.

Anything else, Gentlemen?

MR. PARTLOW: That is all I have, Your Honor.

MR. CEARLEY: No, sir.

THE COURT: All right. I have enjoyed working with you. You may be excused.

(Adjournment).

THE STATE OF ARKANSAS
SECOND JUDICIAL CIRCUIT

REPORTER'S CERTIFICATE

I, Thomas R. Lancaster, R.P.R., Official Court Reporter within and for the Second Judicial Circuit of the State of Arkansas, duly qualified, appointed and acting, do hereby certify that the annexed and foregoing pages of typewritten matter contain a true, correct and complete transcript of all of my stenographic notes on the ruling of the court in the above-entitled cause, when the matter was heard in Osceola, Arkansas, on Monday, June 13th, 1977, to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand on this 19th day of June, 1977.

/s/ Thomas R. Lancaster
Registered Professional Reporter
Official Reporter

THE STATE OF ARKANSAS
SECOND JUDICIAL CIRCUIT

JUDGE'S CERTIFICATE

AND on this day comes the Respondent and presents this, his transcript of testimony, to the Judge hearing said case and the Judge, after duly examining same doth order said transcript of testimony be by the Clerk filed and made a part of the record herein.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 15th day of August, 1977.

/s/ A. S. Todd Harrison
Circuit Judge

APPENDIX "III"

BEFORE THE
ARKANSAS STATE MEDICAL BOARD

IN THE MATTER OF:

C-76-200

JOHN Q. ELLIOTT, M.D.
209 West Ash
Blytheville, Arkansas

DECISION AND ORDER

On October 26, 1976, an Order to Show Cause was issued by the Arkansas State Medical Board, directed to John Q. Elliott, M.D. The Order to Show Cause was served upon John Q. Elliott, M.D., by registered mail on October 28, 1976. The Order advised Dr. Elliott that he was charged with having violated provisions of *Ark. Stat.* §72-613(e)(g), in that he had written prescriptions for Schedule II drugs excessively and had written an excessive number of prescriptions for Schedule II drugs for some persons and that he was guilty of grossly negligent malpractice in the prescribing and dispensing of said drugs. Hearing was set on the Order to Show Cause for December 9, 1976.

Hearing was held on December 9, 1976 at which Dr. John Q. Elliott was personally present.

FINDINGS OF FACTS
AND CONCLUSIONS OF LAW

Mr. Woodrow T. Little, Director, Bureau of Narcotics and Dangerous Drugs, testified that during the months of June and July, 1976, the records of the pharmacies in the

Blytheville area showed large quantities of prescriptions written by Dr. Elliott for Quaalude 300, said prescriptions written mostly for young people.

Mr. Samuel R. Probasco, Drug Abuse Investigator for Arkansas State Department of Health, testified, and produced evidence of prescriptions written by Dr. Elliott and filled at the Pill Box, Highway 61 South, Blytheville, Arkansas, showing that eighty-nine (89) prescriptions for Quaalude 300 were filled at that drug store between July 21, 1976 and November 13, 1976, and that the record of Plaza East Walgreen Drug, Blytheville, Arkansas, showed sixty-four (64) prescriptions for Quaalude 300 were filled, written by Dr. Elliott, between November 9, 1976 and December 2, 1976. Mr. Probasco further testified that the records of the other four drug stores in the area showed similar information. Mr. Probasco further testified that fifty percent of the drug problem in the Blytheville area was caused by the indiscriminate writing by Dr. Elliott of Quaalude 300 prescriptions.

Based upon the evidence presented, the Board hereby unanimously finds that Dr. John Q. Elliott has written prescriptions of Quaalude 300 excessively and has written an excessive number of prescriptions of Quaalude 300 for some persons, as reflected by the evidence.

CONCLUSIONS OF LAW

The acts of Dr. John Q. Elliott, found above, constitute malpractice and the actions of Dr. Elliott are in violation of the Arkansas Medical Practices Act.

ORDER OF THE BOARD

The license to practice medicine and surgery in the State of Arkansas heretofore issued by this Board to John Q. Elliott, M.D., is hereby suspended pending further hearing, provided that such hearing is requested by John Q. Elliott, M.D., at least twenty days prior to the next regular meeting of the Board.

Dr. John Q. Elliott is hereby notified of his rights of appeal as provided for in the Administrative Procedure Act, *Ark. Stat. Ann.* §5-701 *et seq.*

Dated this ——— day of December, 1976.

FILED December 28, 1976.

ARKANSAS STATE MEDICAL BOARD

By: /s/ Joe Verser, M.D.
Its Secretary

APPENDIX "IV"

IN THE
SUPREME COURT OF ARKANSAS

ARKANSAS STATE MEDICAL BOARD ..... *Appellant*

vs. No. 77-258

JOHN Q. ELLIOTT, M.D. ..... *Appellee*

AN APPEAL FROM
MISSISSIPPI COUNTY CIRCUIT COURT
CHICKASAWBA DISTRICT

HONORABLE A. S. HARRISON, *Judge*

PETITION FOR REHEARING AND
BRIEF FOR APPELLEE

PETITION FOR REHEARING

Appellee petitions the court for a rehearing in this cause on the grounds that the opinion entered by this court on March 13, 1978, contains grievous errors of fact and of law; that the court either has not read the transcript of the hearing before the Appellant Board and therefore is unaware of the irregularities of law contained therein or, in the alternative, has completely misconstrued the evidence presented by the Appellant Board against Appellee.

Petitioner would state further that the Brief to be filed with this court and made part of this Petition will set forth specific examples of complete distortions and irregularities of fact contained in the Opinion filed by this court and Petitioner states further that the Opinion of this court affirming the action of the Appellant Board is based completely and entirely upon evidence that is not substantial of record for the reason that same constitutes hearsay, vagueness, exaggeration, innuendo and irrelevancy.

Petitioner would state further that he had requested the court in his original Brief to read the very short transcript of the Appellant's hearing involving this Appellee and he would again request that the court take the time to read this very short transcript and the court will then be satisfied beyond any doubt that the evidence presented before the Appellant Board was not supported by substantial evidence of record and that said hearing was violative of Appellee's constitutional rights and in excess of Appellant's statutory authority.

Petitioner would state further that the action of this court in its Opinion rendered on March 13, 1978, reversed the action of the Circuit Court with directions to reinstate the Order of the Appellant Board; that at the very least and in the alternative, Petitioner would request that this court order that this matter be remanded to the Appellant Board for another hearing at which time Appellee will have the opportunity to be present and with Counsel and to have his constitutional rights protected.

WHEREFORE, Appellee prays for rehearing in this cause; that upon said rehearing the court affirm the action of the Circuit Court; that in the alternative, and should this court deem it necessary to reverse the Circuit Court, then

and in that event they reverse with directions to remand the cause to the Appellant Board of an additional hearing to be held.

PARTLOW & MAYES, P.A.
Attorneys for Appellee
311 North Second Street
Blytheville, Arkansas 72315

By: GRAHAM PARTLOW

BRIEF AND ARGUMENT

Appellee would first point out that the court in its Opinion of March 13, 1978, has quoted certain portions of the very brief transcript of the hearing before the Appellant Board and it would appear to Appellee that the court did not read that transcript in its entirety in order to obtain the complete picture of that hearing before that Board or, in the alternative, that the court simply misread parts of that transcript. Appellee will attempt in this Brief to point out those glaring discrepancies between what that transcript actually shows and what the opinion of this court quotes.

The court opinion sets out that Dr. Elliott personally appeared at the hearing and participated therein without making objection to the charges or requesting that they be made more definite and certain. Apparently the court completely ignored Appellee's argument set forth in his Brief regarding the violation of his constitutional rights by failing to inform him that he had the right to have Counsel present with him, by failing to inform him that he had the right to object to the testimony introduced at the trial and by failing to inform him that he had the right to cross-examine the

witnesses. He was not even given the rudimentary explanation that any layman appearing at any hearing involving his constitutional rights would be entitled to receive and most certainly his constitutional rights were violated when his right to practice medicine in this State, which constitutes a valuable property right, was placed in jeopardy without him being forewarned of what his rights would be at the hearing. Appellee would further point out that if the court would simply read this transcript, the court would see that an attorney for the Board was present and attempted to advise Dr. Elliott of his rights but at no point did he advise him that he would have the rights as set out herein. Appellee was rather shocked when he read the opinion of this court because he felt there would simply be no need to cite authority after authority to sustain his position that his constitutional rights were violated before this administrative hearing. He had requested the court simply read the transcript and he had pointed out where his rights had been violated but from an examination of the Opinion of this court entered on March 13, 1978, it appears that those arguments were completely ignored.

The Opinion of this court contains yet another inaccuracy and apparently again the court has simply misread the transcript of the Appellant Board. The court points out in its Opinion that the evidence showed that Dr. Elliott had been before the Board on November 7, 1974, at which time he had agreed not to write prescriptions for amphetamines. Now, apparently in the context of the Opinion, the Supreme Court has chosen to use that prior appearance as a prior conviction for impeachment of Dr. Elliott's testimony or, in the alternative, simply as a prior conviction to show guilt on this occasion. Appellee, however, would point out to the court that this hearing involved the prescribing of

Quaalude 300 which is a sedative and not an amphetamine. The prescribing of Quaalude 300 has absolutely nothing to do with his previous prescribing of amphetamines and, in fact, Appellee, not having been advised of his constitutional rights to cross-examine and not knowing exactly what his rights were and being completely ignorant, in fact of court-room procedure or administrative board procedure, could quickly have had the reference to prior appearance involving amphetamines completely removed from the transcript.

Appellee has found yet another reference in the opinion of the court quoting one of the witnesses at this so-called hearing and it is rather ironic that the very statement quoted by this particular witness is the very thing that Appellee attempted to point out to this court in his Brief in order to prove that this hearing was so far beyond the realm of legality, proper procedure and protection of one's constitutional rights as to be a complete farce. The court quotes Mr. Probasco when he stated that Dr. Elliott "was the only doctor in Blytheville who was writing more prescriptions for Quaalude 300 than could be counted on one hand." There was absolutely no evidence in this record regarding the amount of patients that Dr. Elliott sees and there was absolutely no criteria for how many prescriptions he or any other doctor could write for this or any other drug. This is simply one of the arguments advanced by Appellee to show the complete inadequacy of the record in this cause and the lack of statutory authority because no standards were set. Now, Appellee would point out to the court that the last time he counted, there were five fingers on one hand and taking two hands makes a total of ten fingers and although Appellee realizes that Mr. Probasco was using a figure of speech, nevertheless, he

points out to the court that this was highly improper for this witness to make this statement and for this type of statement to be admitted before this hearing.

The Opinion of this court then quotes Mr. Probasco further when it pulls from context a statement Probasco made when he questioned drug stores in West Memphis wherein they had told him they turned down Dr. Elliott's prescriptions "always for one reason — youngsters, no physical need." Now, had the court read that very brief transcript of the Appellant's hearing, it would have found that Probasco made an additional statement immediately following the above quoted sentence wherein he stated:

> "Apparently, we can't take their judgment on that and also a seedy looking group as a whole."

Appellee simply points out that the witness Probasco on the one hand quotes stores in West Memphis as saying they turned down prescriptions but on the other hand, in the very next breath, he states they can't take their judgment on that. Now it would appear to Appellee that this transcript of the hearing before the Appellant Board was either made by someone not trained in shorthand and who simply took it down in longhand and then reduced it later according to his or her memory as to what had been said or, in the alternative, if it was taken down in shorthand verbatim then the people were speaking in rather strange terms. At any rate, the court in its cursory examination of this transcript has chosen to pull one statement out of context made by a witness who appeared against Dr. Elliott and Appellee would remind the court that this witness' testimony was completely incompetent, based solely upon hearsay, and that Dr. Elliott had not been advised of his rights to cross-examine him.

The witness Probasco, it might be pointed out by Appellee, appears to have been the most damaging witness against Appellee according to the court's opinion and the court's interpretation of that transcript. Even though the witness appeared and made highly conjectural and speculative statements, based upon exaggeration and innuendo and all of which constituted hearsay and incompetent evidence, nevertheless, the court has chosen to pull that witness' testimony from the transcript and to use that witness' testimony to convict this Appellee. Probasco testified that between July 21 and November 13, 1976, he found one store in Blytheville had filled 92 prescriptions for Quaalude 300. So what! There was no evidence to show how many stores in Blytheville were filling prescriptions written by Dr. Elliott and as the court well knows, most doctors prefer or favor one drug store in a community rather than spreading their business among all the drug stores and, in fact, the old custom was that the drug stores paid the doctors a rebate on the prescriptions they wrote. Now, assuming Dr. Elliott uses one store in Blytheville, the period of time quoted by Probasco is 84 working days. Is it unreasonable to assume that during that period of time the Appellee would have written 92 prescriptions for this particular sedative? There is no evidence here to show the size of his practice, the number of patients he sees, the number of factory workers who see him and who are working swing shifts and who need some sort of sedative to enable them to sleep during the day when the noise of traffic and people is normally enough to prevent sleep. Nor is there any rule, statute, standard or regulation set by any court, legislature or governmental agency or body that establishes the number of prescriptions that a doctor can write for this or any other drug. The court has seen fit to quote the vague and

ambiguous regulations that the Appellant relied upon and nowhere in those rules, regulations or laws is there any set standard that any reasonable man can use to govern his activities. Here again is a violation of this Appellee's rights when he is punished for failing to abide by a governmental edict that is so vague, ambiguous and uncertain that no man of reasonable mind could interpret the exact standard by which he was expected to operate his business.

One of the arguments advanced by Appellee when he appeared before Honorable A. S. Todd Harrison, Circuit Judge of this District, was the complete and total disregard shown by the Appellant Board for this Appellee's rights. As an example of that, Appellee pointed out to the learned trial judge that part of this transcript wherein one of the members of the Appellant Board made the statement that this was a "wonderful drug that they can take one of them and shack up a week." Now, in response to that, the Appellee, who by this time had been placed at ease by the apparent informality of this hearing dealing with his valuable property rights, stated that people had tried it and told him that mixed with alcohol was what they liked about Quaalude because it heightened their sexual performance. Isn't it rather odd that no one thought to ask the Appellee when he had obtained that information; in the alternative, isn't it rather odd that Appellee stated he had only recently obtained that information but it wasn't shown in the transcript. The sad thing about this particular part of the transcript is that the court, in its opinion, saw fit to again remove from context the statement made by Appellee but nothing whatsoever was said about the statement made by the member of the Board preceding Appellee's statement.

The court in its Opinion states that it finds ample evidence and, in fact, evidence corroborated by Dr. Elliott to

sustain the decision of the Board which Appellee chooses to call a conviction. But can any reasonable man who sits down and takes just five minutes of his time to read this abbreviated record or transcript of the proceeding before this Appellant Board, arrive at any conclusion other than the fact that the entire abbreviated record is replete with hearsay, innuendo, uncorroborated conclusions of fact, exaggeration and speculation?

The court then states that Appellee prescribed Quaalude 300 for both young and old people and to persons who did not have anything wrong with them. Appellee is at a loss to determine exactly what the court means by this but if the court is setting a standard for the prescribing of medicine to only those who have "something wrong with them", then the court has set a standard that was not enacted by the Legislature nor by an administrative board or agency of any federal or state government. Quaalude 300 is a sedative and in the simplest context of the term, having "something wrong with you" means that you are ill. A sedative is for those who are unable to obtain sleep normally and it is not for someone who is ill. Here again the court has completely misinterpreted this hearing, the basis of the hearing, the evidence presented at the hearing and even what the drug for which he was charged as having excessively prescribed, was for.

The court finds in its opinion that there was substantial evidence to corroborate the decision of the Board and, in fact, the evidence was corroborated by Dr. John Elliott himself. Appellee would again point out that the court has completely misinterpreted the transcript of this proceeding and what the Appellant's proceeding was all about. In the opinion the court states that Dr. Elliott had been prescribing Quaalude 300 for both young and old people and to

persons who did not have anything wrong with them. At the risk of being repetitious, Appellee would state that there is no rule, standard, order or law that provides that Quaalude 300 should be prescribed for middle aged persons or persons 30 years of age or 45 years of age and simply because he was prescribing for young and old people is by no means indicative of the fact that he was violating any standard or guilty of malpractice. Now, the court again makes reference to the fact that he was prescribing Quaalude 300 for persons who did not have anything wrong with them and Appellee would simply point out once again that Quaalude 300 is a sedative which in common terms means a sleeping aid. It is not for persons who "have something wrong with them" but it is simply for persons who need sleep and are unable to obtain it and Dr. Elliott represents a great number of people who work in factories, many of whom work the swing shifts and all of whom have some difficulty in sleeping because of the change of their hourly or daily routines.

The court in its Opinion also dwells on the fact that Appellee had prescribed Quaalude 300 under two separate names for the same black man. This again is a prime example of failure to read the transcript and/or misinterpretation of what was read. There is absolutely no evidence that this Appellee prescribed this drug or any other drug or medicine for the same man under two names. There was evidence in the nature of hearsay by Probasco that the Osceola Police had arrested a black man who had two prescription bottles in his pocket made out in two different names but there was absolutely no evidence that this black man had applied to Appellee for both of these prescriptions and had used two different names and can it be said that an inference could also be drawn that this man had either

stolen or appropriated either one or both of these bottles from other persons? The court apparently in its Opinion and throughout its Opinion has drawn inferences completely against Appellee; Appellee would simply ask that the court for once draw an inference in his favor since it is Appellee's constitutional rights being violated and not Appellant's.

In conclusion, Appellee would point out to this court that the decision of the Appellant Board was not in the least supported by substantial evidence of record and this was pointed out by Appellee in his Brief and authorities were cited to substantiate his position. Appellee had begged the court simply to read this abbreviated transcript of the hearing before the Appellant Board. Appellee realizes this court is burdened with appeals but can anything be more important than the reputation and standing in the community of a long time resident and a medical practitioner for over 40 years? And in addition to that, can anything be more important than his constitutional right to practice medicine and to earn a living without being harassed, bothered and interfered with by some bureaucratic board completely oblivious of his or anyone else's constitutional rights.

The court again in its Opinion pointed out that Appellee had prescribed Quaalude 300 to the same man under two different names who admittedly had nothing wrong with him. As Appellee has already stated, he did not prescribe the same medicine to the same man under two different names. Probasco's uncorroborated hearsay testimony was to the effect that the Osceola Police had discovered a man with two bottles in his pocket written out in two different names but there was no evidence that this Appellee had prescribed medicine for this same man and, in fact, if the

court will simply read the transcript, Appellee attempts to deny this charge even though the reporter has simply attempted to place certain parts of Appellee's denial in the record. Now as to the charge that nothing was wrong with him, Appellee would again point out that Quaalude 300 is a sleeping compound and fortunately the reporter who took down some of this testimony does quote Appellee when he states that the man looked like he had been awake two or three days when he came to see him.

The court has disposed of Appellee's constitutional argument by simply stating that the notice was adequate under the Administrative Procedures Act. Can the court deny that Appellee's right to practice medicine is not a valuable property right and to be jealously guarded and protected by our courts? Can it really be said that this so-called administrative hearing which violated every concept of due process was constitutional? Can any member of this court who reads this record not find a complete denial of Appellee's basic rights? There are more constitutional rights and violations of same involved in this case than simply a lack of notice and it would appear that any court jealous of the constitutional rights of citizens would make more than a cursory examination of a record such as the one in this case and would easily find violations of basic constitutional rights, whether they were pointed out in briefs filed or not.

The learned trial judge in this case, Honorable A. S. Todd Harrison, Circuit Judge for the Second Judicial Court of the State of Arkansas, took the opportunity to read the transcript of the hearing before the Appellant and then took the opportunity to patiently listen to the arguments of Counsel involving the positions of the respective parties in this case. Judge Harrison had no hesitation in reversing

the decision of the Appellant Board and did so under the provisions of Arkansas Statute §5-713(h), which provides that the court may reverse or modify the decision if the substantial rights of the Petitioner have been prejudiced because of the grounds therein enumerated. There is absolutely no question whatsoever that this Appellee's substantial rights have been so prejudiced and so violated by the actions of this Appellant Board that even a remand to the Board would be a further violation of his constitutional rights, although Appellee is requesting this court as alternative relief, to grant a rehearing and if necessary, order that the matter be remanded to the Board for additional hearing.

Lastly, Appellee finds that the most cruelly ironic part of the Opinion is the court's reasoning that there is no authority for an administrative board to have the same concern for the individual that is required in a criminal prosecution. This court hears, reads, reviews and carefully studies criminal appeals every day. And it renders judicial aid to the accused for the most tenuous grounds. Yet, a respected, long time member of the medical community is treated in a cavalier manner by this Appellant Board and this court has chosen to overlook the gross disregard of his rights and participate in this travesty of justice by affirming the Board's action. Appellee again repeats his request that this court, as a body, simply read the very abbreviated transcript of this hearing before the Appellant and the court will find that no man possessed with a reasonable degree of intelligence and a moderate amount of respect and concern for his fellow man, can fail to see that the Appellant Board completely and totally violated and disregarded Appellee's basic constitutional rights.

Appellee respectfully requests that this court review this record and reverse its decision and affirm the action of the trial court and in the alternative and at the very least order the matter be reheard by the Appellant Board. To affirm the action of the Appellant Board in this case is to place a stamp of approval upon the deprivation of Appellee's valuable constitutional rights without due process; to give license to any Board or agency to violate the rights of our citizens with impunity; to remove all safeguards for protection of our citizenry before the power of government; and finally to inform the Appellant Board and others that hearsay, innuendo, speculation, miscalculation, conjecture and exaggeration are condoned by this court which is the last resort we have from illegal or oppressive acts by government, acting through its agencies.

Respectfully submitted,

PARTLOW & MAYES, P.A.
311 North Second Street
Blytheville, Arkansas 72315

By: GRAHAM PARTLOW

Attorneys for Appellee

APPENDIX "V"

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 3rd day, being the first Monday of October, A.D. 1977, amongst others were the following proceedings, to-wit:

On the 17th day of April, A.D. 1978, a day of said term

ARKANSAS STATE MEDICAL BOARD ..... *Appellant*

vs. No. 77-259

JOHN Q. ELLIOTT, M.D. ..... *Appellee*

APPEAL FROM MISSISSIPPI CIRCUIT COURT
CHICKASAWBA DISTRICT

Rehearing denied.

In TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 26th day of May, A.D. 1978.

JIMMY H. HAWKINS, Clerk

By: /s/ Robin Henderson, D.C.

APPENDIX "VI"

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 3rd day, being the first Monday of October, A.D. 1977, amongst others were the following proceedings, to-wit:

On the 1st day of May, A.D. 1978, a day of said term

ARKANSAS STATE MEDICAL BOARD ..... *Appellant*

vs. No. 77-258

JOHN Q. ELLIOTT, M.D. ..... *Appellee*

APPEAL FROM MISSISSIPPI CIRCUIT COURT
CHICKASAWBA DISTRICT

Motion of appellee to stay mandate pending appeal to the United States Supreme Court is granted. Harris, C.J., Byrd and Howard, JJ., would deny the motion.

In TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 26th day of May, A.D. 1978.

JIMMY H. HAWKINS, Clerk

By: /s/ Robin Henderson, D.C.

APPENDIX "VII"

IN THE SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS ..... *Appellant*

vs. No. CIV 77-258

JOHN Q. ELLIOTT ..... *Appellee*

PETITION FOR STAY OF MANDATE

Comes now the Appellee, John Q. Elliott, M.D., and for his petition for stay of mandate, states:

1. That by this Court's decision dated March 13, 1978, this Court reversed Circuit Court, Chickasawba District, Mississippi County, reinstated the Arkansas State Medical Board ruling.

2. That at the present time there is a Petition for Rehearing pending before this Court.

3. That the Appellee desires prosecute proceedings to the Supreme Court of the United States by certiorari.

4. That Appellee will provide a copy of the record in this case to the Clerk of this Court.

5. That pursuant to Supreme Court Rule 22(C), issuance of Mandate in this case should be stayed pending proceedings in the Supreme Court of the United States.

6. That at this time Petition for Rehearing is pending before the Court, upon such action as this Court should take on Petition for Rehearing could result in irrefutable harm to the Appellee, and certain property rights could be divested from the Appellee unless this Court stays Mandate.

WHEREFORE, Appellee prays an order of this Court

staying the issuance of Mandate in this cause pending prosecution of proceedings to the Supreme Court of the United States.

SCOTT MANATT
Attorney for Appellee

By: /s/ Scott Manatt

AND

PARTLOW & MAYES, P.A.
311 North Second Street
Blytheville, Arkansas 72315

FILED: April 3, 1978
/s/ Jimmy H. Hawkins, Clerk

STATE OF ARKANSAS)
) VERIFICATION
COUNTY OF CLAY)

Scott Manatt, after being duly sworn, states:

I am one of the attorneys for the appellee herein, and the facts and statements contained in the above and foregoing instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Scott Manatt

SUBSCRIBED AND SWORN TO before me, a Notary Public, on this 3rd day of April, 1978.

My Commission Expires:
1-28-81

/s/ Ellen Lewis, Notary Public

CERTIFICATE OF SERVICE

I, Scott Manatt, one of the attorneys for the appellee in the foregoing cause, hereby certify that a copy of the foregoing instrument was duly served on the appellant by depositing same in the United States mail, bearing sufficient postage, and addressed to Eugene R. Warren, 1014 West Third Street, Little Rock, Arkansas 72201, attorney for the Appellant and Bill Clinton, Attorney General, State Capitol, Little Rock, Arkansas 72201, on this 3rd day of April, 1978.

/s/ Scott Manatt

APPENDIX "VIII"

BEFORE THE
ARKANSAS STATE MEDICAL BOARD

IN THE MATTER OF:

JOHN Q. ELLIOTT, M.D.
209 W. Ash
Blytheville, Arkansas

ORDER TO APPEAR AND SHOW CAUSE

The Arkansas State Medical Board has received evidence that you have been guilty of acts which will justify the revocation of your license to practice medicine in the State of Arkansas.

Specifically, it has been charged that you have violated the provisions of Ark. Stat. 72-613(e)(g) in that you have written prescriptions for Schedule II drugs excessively and you have written an excessive number of prescriptions for Schedule II drugs for some persons as reflected by the attached investigative report.

You have been guilty of grossly negligent malpractice in the prescribing and dispensing of said drugs.

You are directed to appear before the Arkansas State Medical Board on Thursday, December 9, 1976 at 2:00 p.m., room 401 at the Little Rock Civic Center, Little Rock, Arkansas, to show cause why your license to practice medicine in the State of Arkansas should not be revoked. Your failure to appear before the Board will result in the immediate suspension of your license.

ARKANSAS STATE MEDICAL BOARD

By: /s/ Joe Verser, M.D.
October 26, 1976

Supreme Court, U. S.
FILED
AUG 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 78-76

JOHN Q. ELLIOTT, M.D. ..... *Petitioner*

v.

ARKANSAS STATE MEDICAL BOARD ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

EUGENE R. WARREN
1014 West Third Street
Little Rock, Arkansas 72201

ROBERT M. CEARLEY, JR.
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MICHAEL W. MITCHELL
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Attorneys for Respondent

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. ———

JOHN Q. ELLIOTT, M.D. ..... *Petitioner*

v.

ARKANSAS STATE MEDICAL BOARD ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas (App. to Petition) is reported in 563 S.W.2nd 427.

JURISDICTION

The jurisdictional features are set forth in the Petition.

QUESTIONS PRESENTED

The Petitioner presents five asserted questions for review which will be repeated in the later argument in this brief.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are set forth in the Petition.

ARGUMENT

In the interest of brevity and orderliness we shall reproduce the "Questions Presented" by Petitioner in the sequence in which they appear in the Petition and respond to them individually.

First question presented:

1. Whether a doctor of medicine at an administrative hearing involving the question of suspension of said physician's license is denied due process of law if not informed of the nature and cause of the accusations; if not confronted with the witnesses against him; if not given the assistance of counsel for his defense or advised of his right to counsel.

The proceeding involving Petitioner is governed by the following provisions of the Arkansas Medical Practices Act and the Arkansas Administrative Procedure Act.

Arkansas Statutes 72-613 states: "The Board may revoke an existing license or suspend an existing license in the event the holder thereof or the applicant therefor; as the case may be, has committed any of the acts or offenses herein defined to be unprofessional conduct. The words 'unprofessional conduct' as used in this Act are declared to mean:

(g) "grossly negligent or ignorant malpractice."

Regulation Two (2) of the Regulations of the Arkansas State Medical Board reads:

"The Arkansas Medical Practices Act authorizes the Arkansas State Medical Board to revoke or suspend the license issued by the

Board to practice medicine if the holder thereof has been found guilty of grossly negligent or ignorant malpractice. 'Malpractice' includes any professional misconduct, unreasonable lack of skill or fidelity in professional duties, evil practice, or illegal or immoral conduct in the practice of medicine and surgery.

It shall include, among other things, but not limited to;

(4) The prescribing of excessive amounts of controlled substances to a patient including the writing of an excessive number of prescriptions for an addicting or potentially harmful drug to the patient."

The Administrative Procedure Act (Arkansas Statutes 5-708 et seq.) governs procedure of the Medical Board. It provides for notice in administrative adjudication as follows:

5-708. In every case of adjudication:

(a) All parties shall be afforded an opportunity for hearing after reasonable notice.

(b) the notice shall include:

(1) A statement of the time, place and nature of the hearing.

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A short plain statement of the matters of fact and law asserted.

(c) Opportunity shall be afforded all parties to

respond and present evidence and argument on all issues involved.

The Order to Appear and Show Cause which was served upon Petitioner on October 26, 1976 reads, in part:

> The Arkansas State Medical Board has received evidence that you have been guilty of acts which will justify the revocation of your license to practice medicine in the State of Arkansas.
>
> Specifically, it has been charged that you have violated the provisions of Ark. Stat. 72-613(e)(g) in that you have written prescriptions for Schedule II drugs excessively and you have written an excessive number of prescriptions for Schedule II drugs for some persons as reflected by the attached investigative report.
>
> You have been guilty of grossly negligent malpractice in the prescribing and dispensing of said drugs.

Attached to the Order to Appear and Show Cause was a report from the Investigator to the attorney for the Board together with a copy of the investigative check sheet. (R. 10-19). Statement by the investigator in the report and on the check sheet are:

> "I simply see no need of continuing to name all of the patients for whom Dr. Elliott prescribed Schedule II drugs over this investigation period. I feel that the enclosed worksheets are self-explanatory and that Dr. Elliott has not lived up to his agreement with the Medical Board in curtailing his prescribing of these drugs.
>
> I found that several pharmacists in the area would refuse to fill Dr. Elliott's prescriptions. Many of them said that, in their opinion, the people simply had no need for such drugs.
>
> I, also, found some information with the police department in Blytheville that Dr. Elliott had contributed to the illicit drug traffic through his prescriptions.
>
> I think that the Medical Board might want to call an investigator with the State Health Department, who, also, has a substantial amount of evidence pertaining to the prescribing habits of Dr. Elliott, as well as evidence to back up that Dr. Elliott had prescribed Schedule II drugs for the same person under more than one name on the same date.
>
> It seems to me that the enclosed evidence is sufficient for the Medical Board to re-evaluate Dr. Elliott's prescription habits."
>
> "Remarks: Mr. Warren, the above Rx's were all picked up from one Phcy. except the one for Dilaudid — filled in Osceola. Several R.Ph's in area will not fill Rx's written by this M.D. Several people have gotten Rx's from him using 3 or 4 different names, etc. The enclosed Rx's pertain only to this one work sheet. I have several more in that area. And also State Health have some."

It is clear that the Order to Appear and Show Cause with the attachments thereto informed the Petitioner of the charges which had been made against him. He was informed that the investigator had asserted that he was writing prescriptions for Schedule II drugs excessively and that although he had agreed with the Board not to write any more prescriptions for amphetamine drugs he had done so;

that he was writing prescriptions for hard narcotics for persons and that Petitioner was contributing to the illicit drug traffic in his area of the practice. Little's letter also stated that another agency had information on Petitioner's bad "prescribing habits", to wit: The Board of Health. Little's comments on his work sheet attached to the Order to Appear and Show Cause were sufficient to place any person on notice that he should do more than wait until December 9th and hope to talk the Board out of taking action as he had done in 1974 when he was charged with improper prescribing of amphetamine drugs (speed as it is called on the street). Petitioner's failure to employ a lawyer or seek professional advice was not because of ignorance or mental inability, nor of financial inability. (When the Board acted to temporarily suspend his license he moved with alacrity to obtain the excellent attorney he has now.) The magnitude of his prescriptions belie any assumption of a financial inability.

Instead of relying on his ability to persuade the Board to do no more than admonish him not to write prescriptions for Quaalude the Petitioner should have employed an attorney who could and would have availed himself of the discovery procedures secured by Arkansas Statutes 5-709 to administrative hearings.

The second part of this Question Presented is "if not confronted with the witnesses against him." This statement is simply not confirmed by the record which clearly reveals that Petitioner was present during the testimony of Inspector Little and Inspector Probasco. Indeed, several times he interrupted their testimony with explanations and statements of avoidance. The Order of the Board shows that it was issued on the basis of the evidence of these two witnesses given in the hearing in the presence of Petitioner.

The third part of the Question Presented states "if not given the assistance of counsel for his defense or advised of his right to counsel." Petitioner's failure to appear with counsel can be blamed only on Petitioner. He was not denied counsel. The Administrative Procedure Act *Ark. Stat. Ann.* §5-709(a) secured to him the right to be represented by counsel. Petitioner did not choose to employ an attorney. There is nothing in the record to indicate that he was financially unable to do so, or that he was incompetent or mentally disadvantaged. As an active practicing physician it must be assumed that he was not a disadvantaged person.

Nor was the Board required by either statute or the Constitution to furnish Petitioner counsel. *Ferguson v. Gathright*, C.A. 4, 485 F.2nd 504, *Cert. denied* 415 U.S. 933, 39 L. Ed. 2nd 491, 94 S. Ct. 1447.

Nor was the Board required to advise him of his right to counsel. The Miranda Warning does not apply to civil and administrative hearings. *Beckwith v. U. S.*, 425 U.S. 341, 48 L. Ed. 2nd 1, 96 S. Ct. 1612.

Second Question Presented:

2. Whether a stated determination by a voting member of the administrative hearing board, prior to the close of evidence states his opinion of guilt and recommendation of suspension is a violation of the equal protection of the law and due process of law provisions of the Constitution of the United States.

It is true that one member of the Board, Dr. Joe Verser, *after hearing the testimony* did express an opinion that the Board was going to have to take action to take Petitioner out from the influence of people who were taking advantage

of him. It is unfortunately true that when a physician (usually an elderly, part-time practitioner) demonstrates that he can't say no to the drug cult they descend on him in droves. The only successful way to protect him is for the appropriate authority to make it impossible for him to furnish drugs or prescriptions to the abusers. If the physician can't write a valid prescription there is no point in forcing him to write a prescription or injuring him for refusal to do so. People who abuse drugs get "hooked" on them and when deprived of the drugs won't or can't take no for an answer. They then use any means to get the drugs and become a menace to society. The physician whose carelessness helps create the addict can't safely refuse him further drugs.

Addiction frequently comes from "playing around" with drugs with no intention of becoming addicted.

As a member of the Board Dr. Verser was well within the rights of a trier of facts in expressing his opinion as he did.

Third Question Presented:

3. Whether a notice of a hearing specifically charging that prescriptions for Schedule II drugs excessively and excessive number of prescriptions for Schedule II drugs and a further allegation of "guilty of grossly negligent malpractice" in prescribing and dispensing said drugs without any particularization of misconduct or allegation of misconduct with particular certainty is violative of the due process of law and equal protection clause?

We have responded to this contention in our response to the First Question.

Fourth Question Presented:

4. Whether or not unfounded hearsay and testimony replete with conclusions, conjecture, speculation and guesswork not objected to at the administrative hearing (without counsel) but timely raised on appeal to the Supreme Court of Arkansas are a denial of due process of law and equal protection of the law as to this petitioner?

Petitioner asserts that the reception of hearsay evidence by the Board deprived him of due process. The Arkansas Administrative Procedure Act, *Ark. Stat. Ann.* §5-709 provides:

"Irrelevant, immaterial and unduly repetitious evidence shall be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

Hearsay evidence received in administrative proceedings violates no principle of due process. See *Richardson v. Perales*, 402 U.S. 389, 28 L. Ed. 2nd 842, 91 S. Ct. 1420; *Con. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 83 L. Ed. 128, 59 S. Ct. 206; *Spiller v. Atchinson T. & S.F. R. Co.*, 253 U.S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

Fifth Question Presented:

5. Whether an administrative hearing held or conducted in such a way as to curtail or limit explanation or denial of an opportunity to be heard is a denial of the due process and the equal protection of the laws as to this petitioner?

Petitioner is handicapped by the Record in his position taken in the Question.

Dr. Elliott stated: (R. 29) "People who have tried it they tell me that mixed with alcohol this is what they like about Quaalude. It heightens their sexual performance."

Surely Dr. Elliott knew the extreme danger of mixing alcohol with depressant drugs. The news media daily reports of deaths caused by this admixture. But Dr. Elliott also knew of a more dangerous use for Quaalude, one used only by the most hardened of drug abusers. He stated: (R. 30) "They would melt them down and inject them and then take them a drink or two and they were way up out in the blue yonder. Now some of these prescriptions were for kids I have known. Some of them married, some of them twenty, twenty-two or four or five years old."

Investigator Probasco testified that a black male was arrested at Osceola for theft; that when the police conducted a search of his person they found two different bottles of Quaalude in his possession from prescriptions written by Dr. Elliott, one for a Michael Johnson, the other for a Will Jones; that Quaalude was bringing three to four dollars a tablet on the street; that there were too many people getting to Dr. Elliott in the traffic on the street. (R. 31)

Dr. Elliott explains this in these words: (R. 31-32) "They have got me wrong on the Negro. The first one who came in there was about seventy and looked like he had been awake two or three days. He was about five foot nine or ten inches and weighed about one hundred thirty-seven. A day or two later a Negro came in just about my height and gave his name as Will Jones, the same address, age was seventy and a day or two later he comes in there dressed up like one of those Jigaboos like on the Kojak show. That night he was that much bigger than me. I looked at him

in the face and said, 'weren't you in here a day or two ago' and he said, 'no, that was my brother.' I looked down and them shoes were built up like that. So that night Osceola called me they had picked up or stopped him on a traffic deal and he had a match box full of different kinds and I said, 'hold on to him.' I called the City and told them to check on him. They got to checking him and run a rap sheet and he was wanted in Los Angeles and somewhere, I believe it was Reno." This is an interesting description of how drug pushers work but it fails utterly to absolve Dr. Elliott from giving prescriptions to one person in two different names at the same address and for no explained medical purposes.

CONCLUSION

Petitioner was given an opportunity to explain his massive writing of prescriptions for the drug Quaalude. His statements to the Board reflected that most of the prescriptions were for young people who he knew; that he had been told that use of Quaalude with alcohol heightened sexual performance; that he had learned that they were converting the drug into an injectable substance and following up on the injection with alcohol; that when he discovered persons had been arrested with two containers of these drugs obtained on prescriptions written by Petitioner for two different persons he advised the police who had apprehended the culprit to "hold on to him." Surely all this is not the act of an ignorant, innocent country doctor trying to aid mankind.

The Petition should be denied.

Respectfully submitted,

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